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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DOMINICK J. GODINO, Defendant and Appellant.	A130695 (Sonoma County Super. Ct. No. SCR557503)

Defendant Dominick J. Godino (defendant) appeals the judgment and sentence imposed after a jury convicted him of committing lewd or lascivious acts upon the body of a child under the age of 14 with the intent of arousing the lust, passions or sexual desire of himself or the child, in violation of Penal Code, section 288, subdivision (a).[1] We shall affirm the judgment.

PROCEDURAL BACKGROUND

On November 30, 2009, the Sonoma County District Attorney (DA) filed a information accusing defendant in counts I and II of committing a lewd and lascivious act on Jane Doe (age 11) on or about February 28, 2009, in violation of section 288, subdivision (a). Also, in relation to count I, the DA alleged defendant had substantial sexual contact with Jane Doe, within the meaning of section 1203.066, subdivision (a)(8).

Defendant exercised his right to a jury trial. Trial commenced on October 13, 2010 and defendant testified in his own defense. Counsel for the parties presented

[1] Further statutory references are to the Penal Code unless otherwise noted.

closing arguments on October 21. On October 22, the jury returned its verdicts, finding defendant guilty on both counts and also finding true the allegation of substantial sexual contact.

The trial court imposed sentence on November 23, 2010. The court noted probation was precluded by law due to the jury's finding of substantial sexual contact, pursuant to section 1203.066, subdivision (a)(8). On count I, the court found the circumstances in mitigation and aggravation in balance and imposed the midterm of six years in state prison. The court imposed a concurrent sentence of six years in state prison on count II. Defendant filed a timely notice of appeal of December 21, 2010.

FACTS

Prosecution Case

The prosecution presented testimony from Jane Doe's mother (mother), Jane Doe, and two witnesses, B.K. and Ruth E., who testified defendant molested them during drum lessons several years before.[2] Mother testified she is married with one child, Jane Doe (Jane). Jane received a drum kit at Christmas 2008, at which time she was 10-years old. Jane began taking drum lessons with defendant in early January 2009. Her drum lessons were on Saturday mornings in defendant's drum studio at his house. Mother sat in on Jane's first lesson and Jane's father sat in on the next lesson so he could meet the teacher. Thereafter, Jane took lessons alone with defendant.

Mother testified that she picked Jane up after her drum lesson on February 28, 2009. Jane was usually cheerful after her drum lessons but that day she was not. Jane was quiet and uncommunicative, and when mother asked how the drum lesson went, all Jane would say was, "I don't know." Concerned by Jane's demeanor and non-responsiveness, mother decided to pull over and talk to her. She got into the back seat of the vehicle so she could speak to Jane face-to-face. Mother asked Jane what was bothering her. Eventually, Jane told mother that defendant kissed her on the lips and

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[2] The trial court admitted the testimony of B.K. and Ruth E. pursuant to Evidence Code, section 1101, subdivision (b) (section 1101(b)) and Evidence Code, section 1108 (section 1108).

touched her private parts underneath her underwear during the drum lesson. Mother drove home, told her husband what had happened, and he called the police.[3] Jane came into the house, took a shower and brushed her teeth. On the Tuesday following the drum lesson in question, Jane gave video testimony at the Redwood's Children's Center and mother spoke with Petaluma Police Detective Garihan.

Jane Doe, who was twelve years old at the time of trial, testified that she took approximately six drum lessons from defendant at his home. During the lessons, defendant would hold the back of her hand as he showed her how to play the drums. Defendant called her "Princess," and would kiss her on top of the head as she sat on the drum stool and he stood behind her. According to Jane, Defendant first kissed her during the second or third lesson. He kissed her on the cheek and the lips. When defendant kissed her on the lips, his mouth was halfway open. Jane did not like it when defendant kissed her but did not tell defendant because she "was small at the time, so I didn't really know . . . it wasn't really right."

Jane also testified that defendant touched her in several places during her last lesson with him. She testified that defendant touched her on the calf and then moved his hand up to her thigh. Jane was wearing a dress and defendant reached under her dress and put his hand on her thigh. After defendant put his hand on her thigh, he moved his hand up to her underpants and ran his hand over them. Defendant then put his hand under her underpants, touched her private parts, meaning her vagina, with his finger and moved his finger "back and forth really fast" on her vagina. Jane explained that when Defendant put his finger inside her vagina "it didn't feel good." Defendant also ran his fingers in a circular motion on her nipples. Defendant touched her in this manner while she was sitting on the stool at a drum set. When defendant touched her vagina, Jane asked defendant to show her something on the other drum set and told him she wanted to

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[3] Petaluma Police Officer Aaron Lindh testified briefly, stating he was dispatched to Jane Doe's residence at around 11:00 a.m. on Saturday, February 28, 2009, and, based on the information he received from Jane's father, he forwarded the case to a detective at the police department.

go to the bathroom. When she returned from the bathroom, defendant told her not to tell anyone because they would have to stop doing lessons together and "that would break his heart."

B.K., who was 21-years old at time of trial, testified that defendant gave her drumming lessons when she was 15-years old. B.K. took weekly drumming lessons for a period of approximately six months with defendant at Starz Music in Petaluma. During the lessons, defendant would rub her head, put his fingers through her hair and rub her neck. He also rubbed her shoulders and down her lower back. During the lessons, defendant sat next to her and rubbed her inner thigh, close to her crotch. He told her she was beautiful, that he was building a drum studio behind his house and he wanted her to take lessons with him in the evening so they would have more "privacy." B.K. felt really uncomfortable when defendant touched her like that—she usually had tears but hid them because she did not want defendant to notice. At one point, B.K. told her mom defendant made her feel uncomfortable and so her mom sat in on the lessons. Finally, B.K. stopped taking lessons because she felt "scared."[4]

Ruth E., who was 26-years old at time of trial, also testified about her experience as defendant's drumming student. Beginning when she was 15-years old, Ruth E. took drum lessons with defendant at Starz Music in Petaluma for over a year. At first, the drum lessons were fun. Things grew uncomfortable for Ruth E. during the summer, when she wore lighter clothes, such as shorts and tank tops. At that time, defendant began touching her and making comments: Defendant would rub her thighs and say things like, "Baby, I love how smooth your legs are" or "I love it when you wear shorts or skirts so I can feel your legs." Defendant would rub her thighs, at first only occasionally, then at every lesson. One time she remarked her back hurt and defendant offered to crack it for her. Ruth E. agreed, but when defendant cracked her back "it was more like he was rubbing on me from behind with his genitals." Describing defendant's

[4] B.K.'s mother testified pursuant to the fresh complaint doctrine that in August 2005, while they were on a family vacation, B.K. told her that two years before defendant touched her in a sexual manner and made her feel very uncomfortable.

actions when he cracked her back, Ruth E. stated, "It was like he was dry humping me." It got to the point Ruth E. felt really uncomfortable at lessons and did not want to wear certain clothes around defendant. Ruth E. testified, "I was afraid of him touching me, I felt gross every time I went there." Ruth E. stopped taking lessons because she "wasn't learning anything anyway," defendant just wanted to play music and have fun with her.

Defense Case

The defense case included testimony from defendant, his wife, his physician, several character witnesses and the investigating officer assigned to his case. Defendant's wife, Leela Godino, testified she and defendant have been married for almost 40 years and have one child, their adult son Joseph, who is 32-years old, mentally handicapped and lives at home. During their marriage, defendant has been a professional musician and drum teacher; he is also a certified yoga teacher. Defendant began to focus more on teaching drums about 25 years ago so he could look after their son. Defendant gives drum lessons in a studio located at their home. The studio is just inside the front door on the right hand side. The studio is ten feet by twelve feet, has one window that looks out onto the porch at the front of the house, and contains two electronic drum sets that sit side by side.

Leela was present on many occasions while defendant gave drum lessons to students. Sometimes defendant holds the students' hands when showing them how to hold the drumsticks. Defendant touches students when showing them how to use the bass pedal, foot drum and when necessary to correct their posture as they play. Leela never observed defendant massage a student's shoulders, but she has seen him stand behind a student and push down on the student's shoulders to make the student relax. Leela never saw defendant crack a student's back, but he has cracked her back and saw him do it for other relatives.

Leela opined that defendant has a very high reputation for honesty in the community. Leela has watched defendant interact with young female students, ranging in age from ten to eighteen years old, and she has talked with many of their parents. In addition, Leela testified that defendant does not have a sexual or unnatural interest in

underage females. She has seen defendant interact with his students hundreds of times and she has never seen him kiss a student on the lips. Leela testified that "[i]f for one moment there was ever a doubt in my mind that my husband could do anything like that, I would not be sitting in this chair."

Following his wife's testimony, defendant took the witness stand and informed the jury that he is almost 70-years old and had played drums since he was young. At the time of the incident in question, defendant was wearing an orthopedic boot on his left foot because he had severely sprained his left ankle; he was taking medication for the ankle that affected his balance. Over the years, he developed arthritis in his hands and pain in his thumbs from playing drums. As a result, he had to apply several lotions to his hands before playing drums, including Bengay, and Voltaren - a prescription cream. After he applied the lotions, if defendant accidentally touched his eyes, or his genitals, noting that he "made that mistake once," he experienced a stinging sensation.

Defendant started teaching drums in Sonoma County in 1982, giving lessons in one of the four music studio rooms at Starz Music in Petaluma, owned by George Eade. Defendant testified correct posture is required for fluidity and efficiency in playing the drums, and that the first dozen lessons are the most important in teaching proper posture. Students tend to lean or slump, and to correct that he would hold a student by the shoulders to adjust their posture. Defendant testified he has probably massaged a student's shoulders if he thought the student was too tense. To help with a student's relaxation and breathing, he would touch a student's shoulders if they were bunched up and tuck in a student's elbows if they were sticking out. Also, defendant explained "there are four limbs to drumming [and] if we are talking about the legs, I would adjust the foot, the ankle, the knee" to position the student correctly to the drums. For example, defendant touches a student's calf to adjust the foot placement on the pedal and show the student the proper heel-up, heel-down motion on the pedal. Snare drum involves a different technique working with brushes instead of sticks: When teaching snare drum, defendant stands behind the student and reaches around the student to demonstrate the proper circular motion of the brushes.

Defendant remembered teaching B.K.. He gave her lessons typical for a beginner in drumming. He had no idea B.K. felt uncomfortable during his lessons and she never said anything to him about it. No one at Starz Music ever told him he was behaving inappropriately. Defendant stated he "would never touch a student's hair" in the way B.K. said he touched her hair. If he touched B.K., it was "for a correction in the classroom, which is normal protocol." Occasionally, he remarked on how a student looked, such as "You look very nice today" or "You look cool," and tried to address students in a "more contemporary manner so they would feel I wasn't this old guy giving drum lessons." Defendant also remembered Ruth E., who studied with him quite a long time ago. Defendant acknowledged he touched Ruth E."in the course of teaching her the correct posture." When Ruth E.asked him to crack her back, he told her to fold her arms, turned his hip to her back, and gently lifted her up, just as he learned in yoga class.

Regarding Jane Doe, defendant testified her parents called him to arrange drum lessons and he gave her a total of eight lessons. Jane was a complete beginner and defendant worked with her on drum technique, hand-foot coordination and basic rhythms. One weekend, Jane and her mom cancelled the lesson but then showed up unexpectedly. Defendant had some free time, so he gave her a short lesson but did not charge for it. The following week, Jane gave him a present at the start of the lesson, a CD-DVD of the band Green Day. In response, defendant picked one of the beanie bears with a peace sign on it he has in the studio, said, "Here, this is for you" and gave Jane a kiss on the forehead. He kissed Jane on the forehead as a token of appreciation for the gift and had no recollection of kissing her at any other time.

Concerning Jane's accusation that defendant touched her inappropriately, Defendant recalled that Jane expressed a desire to play brushes that day. Defendant showed her basic brush techniques; he stood behind her, placed his arms around her and helped her hold the brushes. He and Jane were sitting side-by-side at the drum kits. Defendant reached over to correct Jane's posture and his left ankle gave way causing him to fall. As he pitched forward onto his knees, he grabbed hold of Jane. Jane looked startled. Defendant was embarrassed and tried to get up and back to his position as

quickly as possible. When defendant fell he grabbed Jane's back and thigh. Defendant grabbed Jane to break his fall and he touched her earlier in the lesson as necessary to show her the proper brush technique. Defendant did not put his finger in Jane's vagina and did not rub her nipples.

On cross-examination, the prosecutor questioned defendant regarding several phone calls he received from Jane Doe's mother that were arranged by the police and recorded. Mother placed the first pretext call to defendant on the evening of March 4, 2009.[5] During this call, mother told defendant "there's something I got to talk to you about" and asked if he had "a moment to talk." Defendant replied, "Yes, I do, I do." Mother revealed Jane Doe told her something had happened at the last drum lesson and stated, "I want to ask you some questions about it." Defendant lowered his voice, said he could not talk about it now, and asked if they "could talk tomorrow." Mother told defendant she was upset and had not told her husband. Defendant replied, "I would prefer if you wouldn't say anything and I would like to talk with you tomorrow."

The defense also called William Sydeman to testify. Sydeman testified he took lessons from defendant every Saturday morning at around 10.30 a.m. from January through March 2009. His lesson was immediately after Jane Doe's lesson and he would usually see her coming out of the house as he was going in for his lesson. Sydeman saw Jane on the day of the alleged sexual offense. He was running a little late and as he was walking up to defendant's house the door opened and Jane came out. She walked past him as he went into the house for his lesson. Sydeman did not notice anything unusual about her; she did not appear upset, frightened or scared.

Dr. Catherine Clark-Sayles, defendant's primary care physician, also testified on behalf of defendant. Dr. Clark-Sayles saw defendant on February 4, 2009, for a pre-operative evaluation for cataract surgery. At that time, defendant reported ongoing pain from an injury to his left ankle that occurred a few months before his visit. He informed Dr. Clark-Sayles that his ankle was unstable. Dr. Clark-Sayles testified defendant has

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[5] Pursuant to the parties' stipulation, this call was played for jury and jury received a transcript to assist with the playback.

severe degenerative arthritis at the base of both thumbs; he received cortisone injections for the condition, and had two separate surgeries on both thumbs. She prescribed an anti-inflammatory medicine called Daypro, or Oxaprozin, that defendant takes in tablet form to provide relief from his arthritis. In addition, she prescribed Voltaren gel, and defendant also uses other over-the-counter arthritis relief gels. All these gels are alcohol based and sting if they come in contact with mucous tissue like the lips or the genitals. Dr. Clark-Sayles also prescribes a drug named Neurontin for defendant. This drug reduces nerve generated pain but its side effects may include drowsiness and dizziness, which can throw the person's "balance slightly off."

Defendant called several character witnesses in his defense. George Eade testified that before he retired, he owned and managed Starz Music in Petaluma for 25 years until it closed in 2005. During that time, defendant was the principal drum teacher at Starz Music in Petaluma, working in one of the four music studio rooms there. Doors to the studios were always closed during lessons to minimize noise problems. Over the years, Eade talked to many students, parents and store managers about defendant and the other music teachers at the store. Based on these contacts and discussions, Eade had no reason to think defendant had an unnatural sexual interest in young girls; defendant's reputation, according to Eade, "was impeccable."

John B. and his daughter Isabella also testified as character witnesses. John, a registered nurse, testified he has two children, including Isabella, aged thirteen. Defendant has been teaching Isabella drums for several years. One time, defendant volunteered to come to their house and help Isabella assemble a new drum kit. Once the kit was assembled, defendant had to adjust it to fit Isabella. John observed defendant touch Isabella's feet, legs and back as he did so, and saw him push her back to adjust her posture.

Isabella testified she has a drum set and likes alternative music. Defendant was her first drum teacher after she got a drum set at Christmas 2008. Isabella described how defendant showed her how to hold the drumsticks and where to place her feet. To assist her, defendant would move her feet and adjust her posture by touching the middle of her

back and pushing down on her shoulders. Isabella took more than 20 lessons from defendant. She never felt uncomfortable during lessons. Defendant never kissed her on the forehead, cheeks or lips.

The last character witness for the defense was Lauren Anderson, a 24-year old Stanford graduate, public school teacher and percussionist. Anderson testified her parents enrolled her in drum lessons when she was about 9-years old at Starz Music in Santa Rosa, where she took weekly lessons from defendant from 1996-2002. Anderson testified she never felt uncomfortable about defendant touching her while instructing her on the drums. Anderson also testified defendant was affectionate towards her; occasionally he gave her a little hug or a kiss on the forehead if she had done well in a lesson or recital. Defendant also used terms of endearment like "Princess," "sweetie" or "hun." Defendant's expressions of affection did not make Anderson feel uncomfortable.

The defense also called Petaluma Police Detective Aaron Garihan, the investigating officer assigned to the case. Detective Garihan testified that in cases of sexual assault, the victim is often referred for a sexual assault examination, in which the victim's genitals are examined for bruising, marks or tears. In this case, Jane was not referred to a sexual assault examiner. The decision not to refer Jane for a sexual assault examination was made by the Petaluma Police Department without consulting medical personnel. Garihan also testified that defendant's house was thoroughly searched and his computer was subjected to forensic examination. No evidence of child pornography was found.

DISCUSSION

A. Confidential Marital Communications

The fact relevant to this issue are these: During the prosecution's cross-examination of defendant's wife, Leela, she testified that she had never seen defendant kiss Jane Doe on the lips. The prosecutor's next question was, "Has [defendant] told you that he ever kissed Jane Doe?" Defense counsel objected "under the marital privilege." The court sustained the objection until it could confer with counsel outside the presence of the jury. The prosecutor continued his cross examination and asked if Leela was

aware defendant "is alleged to have kissed Jane Doe on the lips several times." Leela replied, "Not several times, no. I thought it was one time." The prosecutor followed with, "*And your knowledge is based on what*?" Leela replied without objection, "*My husband talking to me.*"

Subsequently, the court informed counsel it had reversed itself "on sustaining the marital privilege as far as the question that was asked previously. You may ask that as well."[6] The prosecutor then engaged in the following colloquy with Leela:

"Q. Had your husband ever told you that he kissed Jane Doe on the forehead?

A. Yes, he has.

Q. How many times has he admitted to you that he kissed her on the forehead?

A. I think once."

Q. Has your husband told you that he kissed Jane Doe on the lips?

A. No.

[¶] . . . [¶]

Q. Has your husband ever admitted to you that he rubbed her vagina?

A. No.

Q. Has he ever admitted to you that he put his finger inside of her vagina?

A. No.

Q. Had he admitted any of those things you would have left him, right?

A. Absolutely."

Defendant contends he suffered prejudicial error because his wife Leela was forced to reveal confidential marital communications. Respondent asserts defendant waived the privilege when counsel failed to object to the question and answer italicized above. Further, respondent asserts that even if any of wife's testimony was admitted in violation of the privilege, defendant was not prejudiced thereby.

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[6] Later, outside the presence of the jury, the court explained its reasoning, stating that because Leela rendered an opinion defendant was not sexually attracted to young girls, the prosecution was entitled to question her "within the confines of that . . . [s]o I did limit the People to that narrower area."

The confidential marital communication privilege is afforded under Evidence code section 980.[7] The privilege "is vested in each spouse and consequently if a spouse is called as a witness he or she may not testify as to confidential communications without his or her consent and the consent of the other spouse. Either spouse may claim the privilege. (Citation.)" (*People v. Dorsey* (1975) 46 Cal.App.3d 706, 717.)

Here, defendant contends his marital communication privilege was violated because Leela "was forced to tell the jury that her husband had told her he kissed Jane Doe on the forehead, but not on the lips." According to defendant, prejudice ensued because "he apparently admitted to Detective Garihan that he *had* kissed her on the lips. This damaged [defendant's] credibility, as the prosecutor later argued." Defendant also asserts he was prejudiced by the "final litany of questions" about whether defendant had admitted any of the offenses to his wife.

Defendant's claim of prejudice fails. A defendant suffers prejudice from the erroneous admission of privileged communications when it is "reasonably possible that a reasonable jury would have rendered a different verdict had the evidence been excluded. [Citation.]" (*People v. Clark* (1990) 50 Cal.3d 583, 623 [addressing attorney-client privilege].) Here, Leela revealed only one marital communication over defendant's objection, namely, her husband told her he kissed Jane Doe on the forehead. Her testimony about whether defendant told her he kissed Jane Doe on the lips is less clear; because at one point she answered, without objection, that she thought defendant kissed Jane Doe on the lips one time based on "my husband talking to me," yet later replied "No" when asked if defendant had told her he kissed Jane Doe on the lips.

In all events, the prosecutor did not rely on any of Leela's testimony to impugn defendant's credibility in his closing argument. Indeed, the prosecutor referred to Leela's testimony once, during rebuttal, stating: "Now there was a mention about Ms. Godino

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[7] Section 980 provides: "Subject to Section 912 and except as otherwise provided in this article, a spouse . . . , whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife."

. . . testifying as to Mr. Godino's character. And certainly Ms. Godino told us, and no reason not to believe her, . . . she does not believe . . . her husband has an interest in children. . . . This was something that Mr. Godino hid from her for as many years as this has been going on." Rather, to impugn defendant's credibility, the prosecutor highlighted the inconsistencies in defendant's own testimony. Specifically, and in reference to whether defendant kissed Jane Doe, the prosecutor stated: "On direct examination [defendant said] I never kissed her on the lips. He had no recollection of a kiss. Then it was I have no recollection of a kiss other than a Beanie Baby kiss. That was on direct examination. On cross-examination, we talked about three kisses. We talked about [it] for the very first time it came out that the kiss on the lips was a mock kiss. And he admitted that had never been discussed with anybody previously, not with Detective Garihan, not with [mother], a mock kiss. He didn't want to just say, well I kissed her." Having considered the record as a whole, we conclude it is not "reasonably possible" that the jury would have rendered a different verdict in the absence of any error in admitting testimony covered by the marital communications privilege. (*People v. Clark, supra,* 50 Cal.3d at p. 623.)

B. Evidence Admitted Under Evidence Code, Sections 1101 and 1108

Defendant contends the trial court erred by admitting the testimony of B.K. and Ruth E. under Evidence Code, section 1101, subdivision (b) (section 1101(b)) and 1108 (section 1108).[8] We find defendant's contention unavailing.

Under section 1101, evidence of uncharged crimes is inadmissible to demonstrate a defendant's criminal propensity (§ 1101, subd.(a)), but is admissible to show intent,

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[8] Section 1101 permits the introduction of evidence "a person committed a crime, civil wrong or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Section 1101, subd. (b).) Section 1108 provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code,] Section 352." (Section 1108, (subd. (a).)

absence of mistake or accident, identity or the existence of a common scheme or plan. (§ 1101, subd. (b); *People v. Whisenhunt* (2008) 44 Cal.4th 174, 204; *People v. Catlin* (2001) 26 Cal.4th 81, 120; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404, superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505-506.) One caveat, however, is that "[e]vidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (Citation.)" (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Ewoldt, supra,* 7 Cal.4th at pp. 402–403.)

Here, B.K.'s and Ruth's testimony was highly probative on the issue of intent, as well as absence of mistake or accident. The charged offenses required proof that defendant's actions were taken for the purpose of sexual gratification, thus defendant's intent at the time of touching was a key issue for the trier of fact. Defendant admitted he touched the victim, but that he did so in conformance with proper drum instruction protocol, in order to teach proper bodily posture and positioning. Also, he asserted that if he touched the victim around the genital area, it was because he accidentally fell on her, not because he harbored any sexual intent. Both B.K. and Ruth E. contradicted defendant, and their testimony was relevant to prove defendant acted with the requisite intent and not by accident or mistake. Both young women testified defendant touched them in a highly sexualized manner; B.K. testified that during drum lessons defendant ran his fingers through her hair, rubbed her lower back, sat next to her and rubbed her inner thigh, close to her crotch, while telling her she was beautiful. Ruth E. testified defendant would rub thighs and make comments like, "Baby, I love how smooth your legs are" or "I love it when you wear shorts or skirts so I can feel your legs, " and that one time defendant "dry-humped" her while purporting to crack her back. Patently, this testimony was highly relevant to the jury's assessment of whether defendant, as he claimed, acted according to drumming protocol rather than with the requisite intent to sexually arouse.

Defendant, however, contends that the manner in which he touched B.K. and Ruth E. was not sufficiently similar to the manner in which it was alleged he touched the

victim to be admissible under section 1101(b). Specifically, defendant asserts that whereas his behavior with B.K. and Ruth E. "might have permitted the jury to conclude he had some erotic interest in them, [] the relatively insubstantial nature of his contact with them as teenagers had no tendency in reason to suggest that he would touch a ten-year old girl with the intent of appealing to his lusts or passions."

We acknowledge that similarity between the charged offense and the uncharged crime is required for the latter to be admitted under section 1101(b). The degree of similarity required, however, varies with the grounds for admissibility; thus, "[t]o be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. . . . [¶] . . . [¶] A lesser degree of similarity is required to establish relevance on the issue of common design or plan. . . . [¶] *The least degree of similarity is required to establish relevance on the issue of intent*. [Citation.] For this purpose, the uncharged crimes need only be sufficiently similar [to the charged offenses] to support the inference that the defendant probably harbored the same intent in each instance." (*People v. Lewis* (2001) 25 Cal.4th 610, 636-637, internal quotation marks omitted, italics added.)

Here, we conclude the uncharged crimes were sufficiently similar to the charged offense to support an inference defendant harbored the same intent in each instance. B.K. and Ruth E. did not testify defendant touched them on the vagina or breasts, however both testified defendant touched and rubbed them in a highly sexual manner on the inner thighs; Ruth E. even described an instance of "dry humping." Defendant argues the nature of his contact with B.K. and Ruth E. was "relatively insubstantial" in comparison to the contact alleged with Jane Doe, but that argument essentially attacks the weight of the evidence; however, the weight to be accorded to the testimony lies within the province of the trier of fact. (See *People v. Mullens* (2004) 119 Cal.App.4th 648, 659-660 [where defendant was charged with committing lewd acts upon his stepdaughter, in violation of section 288, subdivision (a), trial court did not abuse discretion by permitting female witness to testify "that he touched her thigh on one occasion at the house when she was 14 years of age" because it was "probative on the issue of whether [defendant]

had a disposition for engaging in lewd acts with children" as alleged incidents involved allegedly improper touchings of young girls and "[a]ny dissimilarities in the alleged incidents went to the weight, not the admissibility, of the evidence].)

In sum, the admitted evidence, as explained above, was substantially probative on the issue of intent and satisfied the test for admissibility as a similar prior act. Accordingly, the court did not err in admitting the testimony of B.K. and Ruth E. on the issue of intent under section 1101(b).

Defendant further contends that assuming the challenged testimony is admissible under section 1101(b), its probative value was outweighed by its prejudicial effect, pursuant to section 352.[9] As we noted in *People v. Branch* (2001) 91 Cal.App.4th 274 (*Branch*), whether evidence of uncharged offenses is admitted under section 1101(b) or 1108, in judging its admissibility under section 352 we balance its probative value "against four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses." (*Branch, supra,* 91 Cal.App.4th at p. 282.)

We have already discussed the substantial probative value of B.K.'s and Ruth's testimony on the issues of intent and lack of accident. (See *People v. Fitch* (1997) 55 Cal.App.4th 172, 179 [noting that "[e]vidence of a prior sexual offense is indisputably relevant in a prosecution for another sexual offense" and that "the rationale for excluding such evidence is not that it lacks probative value, but that it is too relevant"].) Turning to the factors we must balance against the probative value of the testimony, we first note the

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[9] Defendant does not directly contest the admissibility of the challenged testimony under section 1108; rather defendant asserts section 1108 inherently denies due process of law and a fair trial. However, defendant acknowledges his due process claim is foreclosed by *People v. Falsetta* (1999) 21 Cal.4th 903, accordingly, we do not address it further. Patently, the evidence of uncharged crimes of child molestation, pursuant to section 647.6, against B.K. and Ruth E. were admissible under section 1108. Even so, evidence admitted under section 1108, like section 1101(b) evidence, must also satisfy the standards for relevance under section 352. (See § 1108.)

uncharged offenses described by B.K. and Ruth E.are less inflammatory than the charged offenses as they did not involve any touching of the vagina or breasts.

In addition, the probative value of the testimony of B.K. and Ruth E. clearly outweighed the possibility of confusion of the issues. As we noted in *Branch, supra,* our Supreme Court has viewed this factor in terms of "whether or not the defendant has been convicted of the uncharged prior offense" due to "the danger that the jury may wish to punish the defendant for the uncharged offenses. . . ." (*Branch, supra,* 91 Cal.App.4th at p. 284.) Here, as defendant points out, he was not charged in connection with his offenses against B.K. and Ruth. However, defendant fails to identify, aside from speculative inferences, any evidence in support of his assertion that the jury sought to punish defendant for committing the prior uncharged offenses in lieu of determining his guilt or innocence on the charged offenses. Indeed, the inquiries sent to the court by the jury during deliberations supports a finding that the jury, consistent with the court's instructions, evaluated the evidence and reached a verdict on the current charges. Specifically, the jury asked for copies of the jury instructions and specific charges, whether count one relates specifically to the crotch area and count 2 relates specifically to the nipple area, and for a read-back of Jane Doe's testimony on direct examination. Accordingly, nothing in the record indicates the jury was confused by the challenged testimony, or that the jury wanted to punish defendant for his acts against B.K. and Ruth E. rather than his acts against Jane Doe.

Turning to the last two factors relevant to the trial court's exercise of discretion under section 352 we first note that the evidence of uncharged offenses was not remote in time. "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible. (*Branch, supra,* 91 Cal.App.4th at p. 284.) Also, "[r]emoteness of prior offenses relates to 'the question of predisposition to commit the charged sexual offenses.' (Citation.)" (*Id.* at p. 285 [noting that in theory "a substantial gap between prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses"].) Here, the acts against B.K. took place less than 5 years before the offense of conviction and those

against Ruth E. less than 10 years before the offense of conviction. Thus, the acts against B.K. and Ruth E. were not too remote in time (see *Ewoldt, supra,* 7 Cal.4th at p. 405 [12-year gap deemed not too remote]), and together they indicate a predisposition to commit the charged offenses that continued over time.

The final factor is the consumption of time involved in addressing the prior offenses. Here, Ruth's testimony, including cross-examination, consumed 45 minutes and a review of the reporter's transcript of B.K.'s testimony suggests that consumed no more time than Ruth's testimony. Also, defendant's denial of their claims consumed little of his overall testimony. Thus, it does not appear that substantial court time was required to address the issues relating to the uncharged offenses.

In sum, the probative value of the challenged testimony was great. On the other hand, none of the factors against which probative value must be balanced weigh heavily in favor of excluding the testimony. Thus, we find that the trial court properly exercised its considerable discretion in admitting the challenged testimony and that it was admissible under section 352. (See *Branch, supra,* 91 Cal.App.4th at p. 286 [noting that under section 352 exclusion of evidence is permissible "only if its probative value is 'substantially outweighed' by the 'probability' that its admission will create a 'substantial' danger of 'undue' prejudice"].)

B. Jury Instruction on Character Evidence

The trial court gave CALCRIM 350 regarding the jury's consideration of character evidence, modified as follows: "You have heard opinion and reputation evidence that defendant is truthful and not unnaturally attracted to young girls in the community where he lives or works. [¶] You may take that testimony into consideration along with all the other evidence in deciding whether the People have proved that the defendant is guilty beyond a reasonable doubt. [¶] Evidence of the defendant's character can by itself create a reasonable doubt. However, evidence of the defendant's good character may be countered by evidence of his bad character for the same trait. You must decide the meaning and importance of the character evidence. If the defendant's character for

certain traits has not been discussed among those who know him, you may assume that his character for those traits is good."

Defendant contends that CALJIC 2.40[10] is more favorable to the defense and more clearly written than CALCRIM 350, as the latter is a "watered down" version of CALJIC 2.40 and should be disapproved. Defendant further contends he was prejudiced by CALCRIM 350 because it was likely to influence the jury to disregard his favorable character evidence.

Preliminarily, we note defendant acknowledges that the CALCRIM 350 instruction was requested by his own trial counsel as well as counsel for the prosecution. Moreover, the trial court discussed the instruction with the parties and defense counsel specifically approved the court's suggested modifications of CACRIM 350 to better fit the evidence presented at trial. Under these circumstances, the doctrine of invited error bars defendant from challenging the CALCRIM 350 instruction because he made a conscious and deliberate tactical choice to request the instruction. (See *People v. Lewis* (2001) 25 Cal.4th 610, 667.) Having requested the instructions, the error, if any, was invited and defendant cannot assert on appeal that he was prejudiced. (*Ibid.*)

Moreover we reject, on the merits, defendant's contention that CALCRIM No. 350 is a watered down version of CALJIC No. 2.40. The cited instructions reflect virtually identical language. Specifically, defendant complains that CALJIC 350 discourages the

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[10] CALJIC 2.40 provides: "Evidence has been received for the purpose of showing the good character of the defendant for those traits ordinarily involved in the commission of a crime, such as that charged in this case. [¶] Good character for the traits involved in the commission of the crime[s] charged may be sufficient by itself to raise a reasonable doubt as to the guilt of a defendant. It may be reasoned that a person of good character as to these traits would not be likely to commit the crime[s] of which the defendant is charged.

If the defendant's character as to certain traits has not been discussed among those who know him, you may infer from the absence of this discussion that his character in those respects is good. [¶] However, evidence of good character for certain traits may be refuted or rebutted by evidence of bad character for those same traits. [¶] Any conflict in the evidence of defendant's character and the weight to be given to that evidence is for you to decide."

jury from giving appropriate weight to character evidence because it permits the jury to "decide the meaning and importance of the character evidence"; however, CALCRIM 2.40 informs the jury in like manner that "the weight to be given to [character] evidence is for you to decide."

In all events, even assuming instructional error, defendant fails to establish prejudice arising from the error. CALCRIM 350 instructs the jury in part that "evidence of the defendant's good character may be countered by evidence of his bad character for the same trait." Defendant asserts this language was unnecessary because the prosecutor presented no "bad character" evidence. Defendant argues this superfluous language is misleading and prejudicial because the prosecutor presented other crimes evidence allowing the jury to consider the other crimes evidence as adverse character evidence. Notwithstanding defendant's overly technical construction of these instructions, our review of the entire charge given to the jury reveals no error. First, regarding evidence of other crimes, the court specifically instructed the jury that "if you decide that the defendant committed the offenses and acts, you may, but are not required to, consider the evidence for the limited purpose of deciding whether or not the defendant acted [with the necessary intent] . . . [¶] . . . *Do not conclude from this evidence that the defendant has a bad character*. . . ." (Italics added.) We presume the jury followed the instructions to consider the other crimes evidence only for the limited purpose specified and not to consider it as evidence of bad character. [11] (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1502), ["It is axiomatic that '[j]urors are . . . presumed to have followed the court's instructions' "].) Additionally, the court specifically told the jurors that all the instructions might not apply, and that they should only follow the instructions that apply based on their factual findings. In sum, defendant is unable to show it is "reasonably likely the jury was misled to [his] prejudice" in the application of CALCRIM 350. (*People v. Hughes* (2002) 27 Cal.4th 287, 341.)

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[11] We specifically disavow the Attorney General's outrageous suggestion that the jury could act contrary to its instructions and consider other crimes evidence as evidence of bad character.

D. Sydeman's Testimony

Defendant contends the trial court erred in restricting the examination of William Sydeman by (1) sustaining an objection when defense counsel tried to refresh Sydeman's recollection of the exact time of his drum lesson on the day in question; and, (2) sustaining an objection when defense counsel asked Sydeman, "When you originally talked to my investigator . . . did you tell him that you thought you were on the porch" [on the day in question]?[12] Any error in the trial court's rulings was clearly harmless.

On direct examination Sydeman testified initially that his drum lesson on the day in question was at "10:30 or 11:00 in the morning." Counsel's request to refresh Sydeman's recollection as to the exact time of the lesson by looking at "an appointment book" was denied. Thereafter, counsel asked again if he had "an absolute recollection of when your appointment was?" and he answered, "I believe it was at 10:30." On cross-examination, Sydeman confirmed he took "lessons every Saturday . . . at 10:30 [a.m.]" Contrary to defendant's assertion, therefore, there was no "missing information" regarding the time of Sydeman's lesson—Sydeman's testimony established his lesson was at 10:30 a.m. In any event, the exact time of Sydeman's lesson was not material; rather, the important fact was that his lesson immediately followed Jane Doe's lesson every week, and his testimony was uncontroverted on that point.

Turning to the court's ruling sustaining the prosecutor's objection to defense counsel's question about what Sydeman may have told the defense investigator, the record discloses that Sydeman testified, on both direct and cross-examination, that on the day in question he was running late; after parking his car, he went straight into his lesson and did not have to wait on the porch for Jane Doe's lesson to end. This was perhaps not the testimony defense counsel hoped for; nevertheless, Sydeman gave other testimony that was both helpful and uncontroverted. For example, he testified that the louver blinds

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[12] It appears defense counsel, in her opening statement, may have promised more than she delivered by telling the jury Sydeman would testify he was waiting on the front porch before his drum lesson and could see through a widow into the studio, where he saw nothing untoward happen.

on the studio blinds on the studio were open, not closed, and that he noticed nothing unusual or remarkable in Jane Doe's demeanor as she left defendant's house. Accordingly, we fail to see how an affirmative answer by Sydeman on re-direct examination, admitting he told the defense investigator he was on the porch prior to his lesson, and thereby impeaching his earlier testimony, would have furthered defendant's cause in any way. Thus, any error in sustaining the prosecutor's objection was harmless. (See *People v. Boyette* (2002) 29 Cal.4th 381, 428-429 [trial court's erroneous limitation on questioning of witness was harmless because "it is [not] reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error," citing *People v. Watson* (1956) 46 Cal.2d 818, 836].)

E. Eade's Testimony

1. Factual Background

On direct examination, defense counsel questioned Eade concerning defendant's "20-plus-year tenure" of the drum music studio at his music store, Starz Music, in Petaluma. Then counsel asked Eade, "And based on your contact with Starz, students, parents, managers, did you develop an opinion about whether or not [defendant] . . . had an unnatural sexual interest in young girls?" Eade answered, "Yes, he did not have an interest." The colloquy continued as follows:

"Q. Now do you also have an opinion about his reputation in the community, based on your contact with students, parents, managers . . . ?

A. Yes.

Q. "And so prior to February of '09, what was your opinion about his reputation in the community as it relates to any kind of deviant sexual interest in young girls?"

A. I had no reason to believe that there was any such behavior.

Q. So in your mind what was his reputation in that regard?

[¶] . . . [¶]

A. Okay. His reputation was impeccable, as far as I was concerned."

On cross-examination, the prosecutor asked Eade how many times, during the interactions he witnessed between defendant and juvenile students, he saw defendant

"kiss a juvenile student on the lips." Eade replied, "Never." Eade gave the same answer when the prosecutor asked if he had observed defendant "touching a juvenile student's thigh." Over defense counsel's objection, the prosecutor next asked if Eade would "have the same opinion today" if he "had [] observed [defendant] kissing a student on the lips." Eade replied, "I would certainly question it." The prosecutor followed with, "Now what is your familiarity with the allegations against [defendant] to which you are testifying?" Here, defense counsel interposed another objection, stating "this has no relevance because of the date I asked." After the court overruled the objection, Eade replied, "I have very little knowledge of it[,]" adding that he was unaware of "the specifics," including the age of the victim or the touching alleged.

2. Analysis

Based on the facts set forth above, defendant contends: (1) trial counsel provided ineffective assistance by "opening the door" to damaging cross-examination of Eade; (2) the trial court erred by overruling defense counsel's objection when the prosecutor questioned Eade about the offenses alleged against defendant.

Defendant's contentions relating to Eade's testimony are governed by the legal principles set forth in *People v. Qui Mei Lee* (1975) 48 Cal.App.3d 516 (*Lee*) regarding proper cross-examination of a defense character witness. In *Lee,* a jury convicted defendant of misappropriation of public funds. (*Id.* at p. 519.) At trial, a defense character witness "testified on direct examination that defendant's reputation for truth and honesty in the community where she lived and worked *was and is* above reproach. He also in effect gave his personal opinion that defendant *was and is* honest." (*Id.* at p. 524 [italics added].) On cross-examination, over defense counsel's objection, the prosecutor asked the witness if he had heard about the specific acts defendant stood accused of, and whether he took those into account in forming his opinion of defendant's character. (*Id.* at pp. 524-525.) On appeal, defendant argued the prosecutor's cross-examination of the character witness amounted to prejudicial misconduct. (*Id.* at pp. 523-524.)

The appellate court in *Lee* held that the "time frame used on direct examination" determines the proper scope of cross-examination. (*Lee, supra,* 48 Cal.App.3d at p. 527.) Accordingly, if a character witness gives an opinion of defendant's reputation as of the time of and prior to the alleged offense, then "any cross-examination regarding his having heard of the charged offense would exceed the scope of the direct examination and thus be improper." (*Lee, supra,* 48 Cal.App.3d at pp. 526-527.) On the other hand, if the "the witness' testimony is delivered in the present tense" then the prosecutor may ask on cross-examination "whether he in fact has heard of the commission of the offense for which the defendant is on trial." (*Id.* at 527.)

Here, defendant asserts trial counsel failed to limit Eade's direct examination to the time period prior to the offense. On that basis, he asserts trial counsel failed to act as a reasonably competent attorney within the meaning of *Strickland v. Washington* (1984) 466 U.S. 668. Defendant's assertions, however, are clearly belied by the record. In her questioning of Eade, defense counsel limited her examination to the time during which defendant occupied a drum studio at Starz Music, which was years before the offense occurred. Only one question post-dated Eade's ownership of Starz Music—when trial counsel asked for Eade's opinion "prior to February of '09," i.e., prior to the time of the charged offenses. Accordingly, the record shows trial counsel limited her questioning to "the time of or preceding the charged offense," consistent with the appellate court's guidance in *Lee*. (*Lee, supra,* 48 Cal.App.3d at pp. 526-527.) Moreover, trial counsel specifically objected (and was overruled) when the prosecutor asked the question at issue. In short, trial counsel's performance on this matter was adequate in all respects, thus defendant's ineffective assistance claim fails.

In his supplemental brief, defendant contends that the trial court, pursuant to *Lee, supra,* 48 Cal.App.3d 516 should have sustained trial counsel's objection when the prosecutor asked Eade if he would hold the same opinion "had you observed [defendant] kissing a student on the lips? Defendant asserts he was prejudiced because "if Eade's testimony had not been impeached by the 'kiss on the mouth' question, the jury would

have concluded that it was highly unlikely that . . . 22 years [would have elapsed] without a complaint if he was a person disposed to molest children." This contention lacks merit.

As an initial matter, we are not persuaded the trial court erred in overruling defense counsel's objection. Before posing the question at issue, the prosecutor asked whether Eade, in observing defendant interact with students at Starz Music, had ever seen defendant kiss a student on the lips, cheek, or forehead. After Eade replied "No" to all three questions, the prosecutor asked, "Had you observed [defendant] kissing a student on the lips, . . . would you have the same opinion today, or would you hesitate?" Viewed in context, the question was not necessarily improper, because it was framed in relation to Eade's ownership of Starz Music, which predated the time of the charged offense by several years. (See *Lee*, *supra*, 48 Cal.App.3d at p. 527.)

Moreover, even assuming the trial court erred by overruling defense counsel's objection, the error did not prejudice defendant. In reply to the prosecutor's question whether Eade would have the same opinion of defendant if he had seen defendant "kiss a student on the mouth question," Eade stated, "I would certainly question it." The hypothetical nature of the prosecutor's question, and Eade's necessarily conditional answer to it, did not undermine Eade's prior opinion testimony, on direct examination, that defendant's reputation in the community as it relates to deviant sexual interest in young girls was "impeccable." Indeed, Eade's candor in answering the prosecutor's question demonstrated an impartial mind and, if anything, may have bolstered his credibility before the jury. In all events, Eade's answer to the prosecutor's "kiss-on-the-mouth question" was a matter of minor significance in relation to the matter at the heart of the case—the jury's ultimate credibility determination between defendant and the victim. Thus, even if the court erred in overruling defense counsel's objection, reversal is not warranted. (See *People v. Ramirez* (1990) 50 Cal.3d 1158, 1193-1194 [error allowing prosecution to exceed the scope of direct examination did not warrant reversal because "there is no reasonable possibility that the error could have affected the judgment in this case"].)

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.